

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

119

BRIEF FOR APPELLANT
In The
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
No. 24,368

United States of America
vs.

Harry R. Gaskins, Appellant

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

C. RICHARD BEYDA
NATHAN WASSE
1707 H Street, N.W.
Washington, D. C. 20006

United States Court of Appeals
for the District of Columbia Circuit

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Nathan J. Paulson
CLERK

Counsel for Appellant

(Appointed by this Court)

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STATEMENT OF QUESTIONS PRESENTED

1. Did not the Court abuse its discretion in not granting defense counsel's motion for a continuance prior to trial?
2. Did not the Court err in denying the defense counsel's motion to dismiss counts one (1) and three (3) of the indictment?
3. Was not the finding of guilt on all counts of the indictment contrary to the weight of the evidence?
4. Did the Court err in denying Appellant's motion for a new trial on the ground of newly discovered evidence?

This case has not been before this Court under the same or a similar title.

References to Rulings - None

In The
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
No. 24,363
Harry R. Gaskins, Appellant

vs.

United States of America, Appellee

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction entered by the United States District Court for the District of Columbia (Gasch, O.) in Criminal Case No. 1919-69 on May 15, 1970. The District Court granted Appellant's application to appeal to this Court without prepayment of costs. This Court has jurisdiction to entertain this appeal pursuant to the provisions of 28 U.S. Code, Section 1291.

STATEMENT OF CASE

On May 15, 1970, Appellant, Harry R. Gaskins, was convicted of two (2) counts of assault with intent to kill while armed, two (2) counts of assault with a dangerous weapon, and one (1) count of carrying a dangerous weapon. This matter arose as a result of the shooting of one Richard J. Haynes and the attempted shooting of one Willie Lee Diggs which occurred at

approximately 2:00 a.m. in the morning of September 21, 1969, in front of the premises then known as the Pantheon Club located on the Northwest corner of 6th and "G" Streets, N.W., Washington, D. C. The following testimony, evidence and facts are a matter of record in this case.

Willie Lee Diggs, a companion of Richard James Haynes, testified that on the evening of September 20, 1969, he and four friends had gone to the Pantheon Club at 6th and "G" Streets, N.W., Washington, D. C., around 10:00 p.m. (Tr. 69, 70) During the course of the evening an altercation took place inside the Club between Mr. Diggs and a man, then unknown to him, concerning a young lady with whom Mr. Diggs was about to dance, and that shortly after their exchange of words this same man threatened to kill him (Tr. 71, 72) Mr. Diggs further testified that later in the evening, he and his two friends had gotten into a car belonging to Richard James Haynes preparatory to going home, whereupon the man who had earlier threatened to kill him, together with a male companion, approached the car and ordered Mr. Diggs to get out. (Tr. 74, 75) Having done so, Mr. Diggs stated, he began running along G Street and, as he did, heard a shot fired. (Tr. 76, 97) Mr. Diggs then testified that when he finally returned to the corner of 6th and G Streets he heard another shot and saw his companion, Richard James Haynes, lying on the ground.

During the trial Mr. Diggs identified Appellant as the man who had threatened his life inside the Pantheon Club and as one of the two men who had ordered him from Mr. Haynes' car. (Tr. 77, 78)

Julian Page, a companion of Richard James Haynes and Willie Lee Diggs, testified that Appellant, in the company of another man, ordered

Mr. Diggs and his other companions out of Mr. Haynes' car. (Tr. 111, 112) He testified that these two men chased Mr. Diggs and that he heard a shot but did not see who fired it. (Tr. 112) He further testified that Richard James Haynes approached these same two men upon their return to the corner of 6th and G Streets and that as he was facing them, was shot. (Tr. 113, 114, 115)

Preston Rivers, Jr., a by-stander, testified that he was in the Pantheon Club on the night of September 20, 1969, and that he witnessed an altercation between two men during which one threatened to kill the other. (Tr. 128, 129) Mr. Rivers identified Appellant as the man who threatened the life of Willie Diggs. (Tr. 130) On direct examination Mr. Rivers testified that during the confrontation between Appellant and Mr. Diggs inside the club, Appellant "backed up with the gun in his hand." (Tr. 130) However, on cross examination Mr. Rivers testified that at no time that evening did he see a gun. (Tr. 134) With regard to the shooting of Richard Haynes, Mr. Rivers testified only that as he was leaving the Club he heard one shot, saw a man lying on the ground but did not see the Appellant at that time.

Richard James Haynes testified that he had been in the Pantheon Club on the evening of September 20, 1969, for a period of only five or ten minutes and then returned to his car. (Tr. 175, 176) He stated that approximately one hour and twenty minutes after he left the club Willie Lee Diggs came out of the Club and, along with the other members of their party, got into his (Mr. Haynes') car. (Tr. 176, 177) Just prior to their leaving a man approached Mr. Haynes' car and began using abusive language, whereupon Willie Diggs got out of the car and began running. (Tr. 177, 178) Mr. Haynes further stated that Mr. Diggs was chased down the street toward the intersection of 6th and G Streets by a man with a cast on his arm. (Tr. 178.) The

witness testified that he heard a shot but admitted that at the time the shot was fired he could see neither Mr. Diggs nor the man with the cast on his arm. (Tr. 179) Mr. Haynes stated that he got out of his car and walked around the front of it toward the sidewalk; that when he reached the sidewalk was confronted by two men one of whom had a cast on his arm. (Tr. 179, 180) One of these, the man with the cast, shot him in the stomach. (Tr. 180) Mr. Haynes later testified that he identified Appellant as his assailant both by selecting Appellant's photograph from a group of photographs shown to him in the hospital and later at a court-ordered lineup. (Tr. 182, 183, 184, 185)

During the course of the trial it was stipulated that Appellant was admitted to Rogers Memorial Hospital on September 15, 1969, for a fractured right hand and was released on September 18, 1969, after a cast was applied to his right hand and that Richard James Haynes was admitted to George Washington Hospital on September 21, 1969, for treatment of a gunshot wound. (Tr. 202)

No further testimony nor any physical evidence other than a photograph marked for identification was proffered by the prosecution.

At the conclusion of the Government's case, counsel for defendant moved for a verdict of acquittal on all charges, which motion was denied. (Tr. 1) Counsel pointed out that there was no evidence that Harry R. Gaskins assaulted Willie Lee Diggs with the intent to kill him, that there was no evidence that Appellant possessed a gun with which to assault Willie Lee Diggs and that there was no evidence showing he fired a shot supposedly aimed at Willie Lee Diggs. (Tr. 206, 207, 208)

Counsel then moved to dismiss the first three (3) counts of the indictment and, in substantiation therefor, argued that no direct evidence

had been adduced to show that Appellant possessed a gun, at the time of the assault on Willie Lee Diggs or that he ever fired one at Willie Lee Diggs. The Court denied these motions holding a prima facie case had been made on these charges and that circumstantial evidence regarding the possession of a pistol by Appellant could be taken into consideration. (Tr. 207)

The defense relied on the testimony of the Appellant and that of a witness in his behalf, Walter Wesley Anderson. Prior to Appellant's taking the stand, defense counsel approached the bench and proffered that the defendant had a record of prior conviction. The Court was presented with the fact that defendant had been convicted in 1966 of robbery, in 1968 of second degree burglary, and in 1968 of carrying a dangerous weapon. (Tr. 209) The Court, however, cited Gordon vs. United States 127 U.S. App. /343, 383 936 F.2d (1967) in substantiation of allowing introduction of defendant's prior robbery conviction for the purpose of evaluating his creditability. (Tr. 210)

D.C.

Appellant thereupon took the stand on his own behalf. He testified that he was, in fact in the Pantheon Club on the evening of September 20, 1969, and that he had exchanged words with Mr. Diggs concerning a young lady, although he never threatened to kill him. (Tr. 211, 212, 213, 214) He further stated as he was standing on the corner of 6th & G Streets, N.W., around 1:45 a.m., he observed Mr. Diggs leave the Club and enter a car. (Tr. 215, 220) However, the witness testified further that Mr. Diggs got back out of the car and it was at that point that Appellant picked up a brick lying on a nearby tree box and began to chase Mr. Diggs. (Tr. 216, 217) Appellant, after chasing Mr. Diggs for a short distance returned to the corner of 6th and G Streets, N.W., where he was approached by Richard James Haynes, who wanted to know what had happened. (Tr. 217) Appellant testified, that as he was

talking with Richard James Haynes, Mr. Haynes turned toward a crowd of people standing nearby and was shot (Tr. 218, 219, 235, 236, 237, 238, 239) by someone whom Appellant did not see. (Tr. 218, 219)

Walter Wesley Anderson, an acquaintance of the Appellant, testified that the Appellant had an argument with a man inside the Pantheon Club in the evening of September 20, 1969. (Tr. 249, 250) He further testified that he saw Appellant chase another man along G Street for about a block, Appellant with a brick in his hand. (Tr. 250) At the time of the shooting of Richard James Haynes the witness testified that he was standing not more than three feet from Appellant. He did not see Appellant fire a shot. (Tr. 251, 252) Moreover, Mr. Anderson, when shown a photograph taken at the Pantheon Club on the night of September 20, 1969, identified a man known to him only as "Ray", a man whom Anderson had seen put a gun in his pocket earlier that evening and who was in the crowd of people on the corner of 6th and G Streets at the time Mr. Haynes was shot. (Tr. 257, 253, 254) On cross-examination the witness testified that he saw the man known to him as "Ray" fire the shot that wounded Richard Haynes. (Tr. 256, 257, 258, 259)

STATEMENT OF POINTS

1. The Court abused its discretion in not granting defense counsel's motion for a continuance prior to trial.
2. The Court erred in denying the defense counsel's motion to dismiss counts one (1) and three (3) of the indictment.
3. The finding of guilt on all counts of the indictment was contrary to the weight of the evidence.
4. The Court erred in denying Appellant's motion for a new trial on the ground of newly discovered evidence.

SUMMARY OF THE ARGUMENT

I.

Before the start of the Appellant's trial defense counsel moved for a continuance of the case in order that he might pursue an investigation utilizing information to be provided by the father of Richard James Haynes. No objection to the continuance was raised by the prosecution, but the trial court denied the motion and ordered the case to proceed forthwith. As a result, relevant and material information was rendered unavailable to the defense at that time, information which, if presented at trial, would in all likelihood have produced a different result.

II.

As a result of the trial judge's misconstruction of the prosecution witnesses' testimonies counts one (1) and three (3) of the indictment were presented to the jury for their consideration. There was no direct proof that Appellant possessed a gun at the time of the assault on Willie Lee Diggs nor that he fired a gun at Willie Lee Diggs. The evidence with respect to counts one (1) and three (3) of the indictment were substantiated only by circumstantial evidence. In allowing their recitation to the jury the trial court lent credence to both counts, thus allowing the jury to consider them in light of merely circumstantial evidence whether that evidence was properly applicable to them or not. Thus, the trial judge improperly presented counts one (1) and three (3) of the indictment to the jury inasmuch as they should have been dismissed as a matter of law.

III.

Serious question has been raised as to whether a prima facie case was presented with respect to the first three (3) counts of the indictment. With respect to the assault of Willie Lee Diggs question has been raised as to whether a prima facie case was ever presented. So far as the shooting of Richard James Haynes is concerned no one accept Richard James Haynes saw Appellant with a gun or saw Appellant shoot Richard James Haynes accept Richard James Haynes. This, notwithstanding the fact that all prosecution witnesses accept for Preston Rivers, Jr., were in close proximity to Richard James Haynes at the time he was shoot.

IV.

Subsequent to Appellant's trial a new witness was dicovered, one who could testify in Appellant's behalf. Defense counsel moved for the granting of a new trial representing to the Court that the witness who would not have been discovered even with the use of a reasonable amount of diligence, that his testimony was relevant and material and in all likelihood would produce a different result in the event his testimony were presented in a new trial. The affidavit of the newly discovered witness clearly shows that his testimony would be relevant, material, substantially greater in detail than the defense testimony adduced at trial, particularly with respect to the assault of Willie Lee Diggs. Based on the representations by counsel and the information supplied by the affidavit of the newly discovered witness, the Court was in error in not granting Appellant's motion for a new trial.

ARGUMENT

I.

THE COURT ABUSED ITS DISCRETION IN NOT GRANTING DEFENSE COUNSEL'S
MOTION FOR A CONTINUANCE PRIOR TO TRIAL.

In refusing to grant defense counsel's motion for a continuance prior to the start of Appellant's trial, the trial Court plainly abused its discretion. J. E. Hanger, Inc., et al vs. United States 81 U.S. App. D. C. 408, 160⁸/F.2d (1947); Payton vs. United States 96 U.S. App. D. C. 222 F.2d 794 (1955). Defense counsel represented to the Court that he was unaware that the father of Richard James Haynes was at the Pantheon Club on the evening of September 20, 1969, until the day of the trial. Defense counsel stated that he had been informed of Mr. Haynes presence by the defendant who himself had been so informed by another man with whom defendant spoke in jail. (Tr. 4) Defense counsel represented to the Court that Mr. Haynes' testimony would in all likelihood be diametrically opposed to that of his son with regard to who shot Richard Haynes. The prosecution's counsel concurred with the representation. (Tr. 5) Inasmuch as defense counsel had had knowledge of Mr. Haynes presence at the time of the shooting and of the extent of Mr. Haynes testimony for only a short period of time, it was defense counsel's intent to pursue an investigation based on the information available from Mr. Haynes and to develop a line of defense from that investigation. Moreover, the prosecution represented to the Court that Mr. Haynes was readily available. (Tr. 5) Thus, trial counsel had clearly demonstrated to the Court who the witness was, his immediate availability for investigative purposes and the materiality and relevance of the information to be obtained from Mr. Haynes.

Neufield vs. United States 73 U.S. App. D.C. 174, 118 F.2d 275, Cert. Denied Sub. Nom Ruben vs. United States 315 U.S. 798, 866 L.Ed. 119, 62 S.Ct. 580 (1942); Leino vs. United States 338 F.2d 154 10th Cir. (1964). In light of the apparent crucial nature of Mr. Haynes testimony and the fact that the defense would have been materially buttressed, the continuance should have been allowed. Moreover, Appellant asserts that in view of the nature of the offenses for which he has been convicted, and the fact that his conviction on all counts is based almost exclusively on circumstantial evidence, the trial court erred in not granting a continuance. Shores vs. United States 80 F.2d 942 9th Cir. (1935) Cert. Denied 297 U.S. 705 80 L.Ed. 993 56 S.Ct. 501; Gilmore vs. United States 106 U.S. App. D. C. 344, 273 F.2d 79 (1959).

II.

THE COURT ERRED IN DENYING THE DEFENSE'S MOTION TO DISMISS COUNTS ONE (1) AND THREE (3) OF THE INDICTMENT.

At the close of the prosecution's case defense counsel moved for a dismissal of the indictment in its entirety. The motion was denied by the trial judge, whereupon he called upon defense counsel to present his arguments for dismissal of the indictment count by count. (Tr. 200) The following colloquy ensued:

"MR. DOBKINS: Your Honor, as to the first count, there is no -- there has been no testimony at all that the Defendant assaulted Willie Diggs with intent to kill Willie Diggs.

THE COURT: Well, the Court must view the Government's evidence in the light most favorable to the Government at this stage of the proceeding.

MR. DOBKINS: Yes, your Honor.

THE COURT: And from the evidence adduced, a bullet wound in the abdomen in the left side, the Court will deny that motion.

MR. DOBKINS: Your Honor, this first goes to Willie Diggs, not Richard Haynes, the one that was shot.

THE COURT: All right, what do you have to say on that (addressing Mr. Bucklin)?

MR. BUCKLIN: Well, your Honor, the evidence does show inside the club, the Patheon Club (phonetic spelling), moments before, this Defendant threatened to kill Mr. Diggs and as witnessed by at least two other people who have testified before the Court, that he said, Diggs understood him to say that he was going to blow him apart and another witness testified that he was going to kill him and "You have to come outside". And within a matter of moments, a shot is fired at him running down the street. Now there is no direct -- I agree with Counsel's phrasing that there is no direct proof as to who fired that shot. We were . . .

THE COURT: I think that's prima facie.

MR. DOBKINS: Your Honor, I would submit that since no one saw Mr. Gaskins, the Defendant, assault Willie Diggs with a . . .

THE COURT: To point a dangerous weapon, such as a loaded pistol at another in a menacing or threatening manner and here he says, "I'm going to shoot you; come outside", is certainly evidence of assault with a dangerous weapon. Now whether that is also evidence of assault with intent to kill depends upon the manner in which it was done and in determining intent, you may take into consideration anything said or done; and here when the man says, "I'm going to kill you, that is sufficient evidence at this stage of the proceedings to justify denial of your motion. It is denied.

MR. DOBKINS: Your Honor, as to the second count, there was no direct testimony that the Defendant assaulted Willie Diggs with intent to kill. Now I would say on this, your Honor, as on the first count, that the evidence of a pistol as far as Willie Diggs is concerned was strictly circumstantial. There is no . . .

THE COURT: Circumstantial evidence may be taken into consideration. I won't exclude circumstantial evidence at a stage of the proceedings in which I must view the Government's evidence in the light most favorable to the Government.

MR. DOBKINS: Your Honor, I would point out that circumstantial evidence requires a dismissal by the Court where the evidence can be subject to any other interpretation under United States against Gasometer (phonetic spelling) Corporation. And this certainly is opened to another interpretation because there has been no evidence to show that at the time any threat was made, assuming that the threat was made, that there was a pistol in the possession of the Defendant. All he had was his hand in his pocket. No one testified to seeing a pistol at any time. The only pistol that was seen, supposedly, was what was seen by Mr. Haynes at the time he talked with Mr. Gaskins on the street corner. That's the first time a pistol was ever put into evidence; prior to that, there has been none and that's why I submit, your Honor, that both the first and second counts should have been dismissed; certainly the second count, and the third . . .

THE COURT: All right, the Court's ruled on it. What's your next point.

MR. DOBKINS: Well, under the evidence of the testimony that's been given, your Honor, when that is taken in the light most favorable to the Government, then the fourth, fifth, sixth, and seventh counts, of course, could not be dismissed, but I take exception to the Court's not granting dismissal of the first three."

It is readily apparent that the trial judge was in error regarding what had been adduced by testimony to that point in the trial. In fact, none of the prosecution witnesses had testified to seeing a gun in Appellant's possession inside the Pantheon Club and none had seen him discharge a gun at Willie Lee Diggs outside the club. Moreover, counsel for the prosecution concurred with defense counsel that there was no direct evidence as to who fired that shot. The trial judge, however, felt that in fact a *prima facie* case had been made out with respect to who fired at Willie Lee Diggs based not on what the testimony actually tended to show but on what he believed it

showed. Thus, considering what he believed the testimony to have shown in the light most favorable to the government, the trial judge denied Appellant's motion for dismissal of the first three counts of the indictment./1

When a motion for a judgment of acquittal is made, the sole duty of the trial judge is to determine whether the evidence presented is capable of or sufficient to persuade the jury to reach a verdict of guilt by the requisite standard. Fed. Rules Crim. Proc. 29(a), 18 U.S.C.; Pritchett vs. United States, 87 U.S. App. D.C. 374, 185 F.2d 433 (1950); Curley vs. United States, 81 U.S. App. D.C. 389, 60 F.2d 229, cert. denied 331 U.S. 337, 67 S.Ct. 1511, 91 L.Ed. 1850 (1947)./2 Even assuming, arguendo, that the trial court had correctly viewed the prosecution testimony in the light most favorable from the standpoint of the government, the motion for acquittal in the first three (3) counts of the indictment should have been granted. An essential element of counts (1) and three (3) had never been established; there was no competent evidence to substantiate the fact that Appellant possessed a gun or fired one at Willie Lee Diggs. At best, possession of a gun at the time of the assault on Mr. Diggs could be attributed to Appellant only by virtue of the testimony of Richard Haynes relative to the assault on him. Appellant asserts that to so impute the possession of a gun to him would be an unwarranted construction of the testimony. Moreover, even if it were held proper to establish the existence of a gun in Appellant's possession at the earlier time by virtue of Mr. Haynes' testimony, the resultant finding on counts one (1) and three (3) would be wholly contingent upon circum-

1. Inasmuch as count two (2) was not considered by the jury since they found Appellant guilty on count one (1), the trial court's denial of the motion to acquit on that count would be "harmless error."
2. See also Cephus v. United States, 117 U.S. App. D.C. 15, 324 F.2d 893 (1963); Campbell vs. United States, 115 U.S. App. D.C. 30, 316 F.2d 681 (1968); Cooper v. United States, 94 U.S. App. D.C. 343, 218 F.2d 29 (1954)

stantial evidence and should not stand. Crawford vs. United States 126 U.S. App. D. C. 156, 375 F.2d 332 (1967); Maryland & Virginia Milk Producers Association vs. United States 70 U.S. App. D. C. 14, 193 F.2d 907 (1951).

III.

THE FINDING OF GUILT ON ALL COUNTS OF THE INDICTMENT WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE.

The finding of guilt on all counts of the indictment was contrary to the weight of the evidence. The Appellant contends that the jury verdict was not supported by the evidence and the Court should have granted a judgment of acquittal, or in the alternative, for a new trial, after the defense rested. Serious question has been raised whether the prosecution presented a *prima facie* case with respect to the first three counts of the indictment and, with respect to the last four counts of the indictment the evidence adduced by the prosecution was inconclusive in its own right and was further diluted by defense rebuttal. No one except Richard Haynes ever testified to seeing Appellant with a gun at any time on the evening in question, even though all prosecution witnesses except for Preston Rivers, Jr., testified to being in close proximity to him. Moreover, all the prosecution witnesses except Preston Rivers, Jr., testified that two men accosted Richard James Haynes. The Appellant at no time denied pursuing Willie Lee Diggs on the evening in question and, additionally, admitted to having chased Mr. Diggs with a brick in his hand, an admission corroborated by the testimony of Walter Wesley Anderson.

Thus no definite showing was ever made as to whether Appellant possessed a gun at the time of the assault on Willie Diggs and, if he did,

whether he fired it at Willie Diggs. No one except Richard James Haynes testified to seeing the Appellant with a gun at the time of the assault on Richard James Haynes even though all prosecution witnesses except for Preston Rivers, Jr., were in close proximity to him when he was assaulted. Thus, on the basis of the evidence introduced at trial, conviction of Appellant on the seven (7) counts stated in the indictment should not stand.

IV.

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL ON THE GROUNDS OF NEWLY DISCOVERED EVIDENCE.

On May 6, 1970, defendant filed a motion for a new trial on the grounds of newly discovered evidence in Appellant's behalf pursuant to Rule 33, Fed. Rule Crim. Proc., 18 U.S.C. Defendant, by his trial counsel, represented in such motion that the newly discovered evidence, a witness, one Ollie Wainwright, had been discovered subsequent to Appellant's trial; that a reasonable search would not have produced this testimony at the time of Appellant's trial; that his testimony would not be merely cumulative of defense testimony adduced at trial nor would tend solely to impeach the testimony of the prosecution's witnesses; that his testimony would be material to the issues presented; and, that in all likelihood, his testimony would produce a different result. Thompson vs. United States 88 U.S. App. D. C. 235, 188 F.2d 652 (1952).

As the affidavit of Ollie Wainwright shows, his testimony, if offered in a new trial, would tend to substantiate the fact that a man known only to him as "Ray" was the one who fired not only the shot which wounded Richard James Haynes, but also the shot at Willie Diggs. It is

most likely that such testimony, if offered at a new trial, would produce a different result since it would be the only testimony relative to who shot at Willie Diggs.^{/3}

Thus, Ollie Wainwright's testimony taken as a whole would materially substantiate the testimony of both Appellant and the defense witness Anderson, and at the same time, would tend to present a clearer presentation of the circumstances surrounding the incident for which Appellant was convicted.

CONCLUSION

Error has been pointed out with respect to several important aspects of Appellant's trial. Defense counsel's motion for a continuance was denied even in the face of a substantiated probability that the investigation based on the testimony of Mr. Haynes' father would have materially enhanced the Appellant's defense. Error was committed by the trial court in denying the defense motion to dismiss counts one (1) and three (3) of the indictment against the Appellant inasmuch as their submission to the jury could be construed as a tacit recognition by the trial court that those charges were meritorious, when in fact they were not. The third error occurred not at trial but subsequent thereto when the trial court considered Appellant's motion for a new trial on new discovered evidence. Defense counsel's motion together with the affidavit of the new witness demonstrates a compliance with the requirements for a new trial as elucidated in the Thompson vs. United States Supra.

3. Neither the prosecution's witnesses nor the defense witness, ,Walter Wesley Anderson, nor the Appellant himself, were able to testify as to who fired the shot at Willie Diggs.

Appellant recognizes that this Court may consider each of the cited errors, standing alone, to be insufficient grounds for the granting of a new trial. However, Appellant contends that the cited errors, when considered together are cumulative in nature and when considered in light of the circumstantial nature of the prosecution's case, a new trial should be granted the Appellant to do substantial justice. Harold Cross vs. United States 22 U. S. App. D. C. 283, 353 F.2d 454 (1965); Jones vs. United States 119 U. S. App. D. C. 213, 338 F.2d 553 (1964); Oliver vs. United States 118 U. S. App. D. C. 302, 335 F.2d 724 (1964).

Respectfully submitted,

C. Richard Beyda

Nathan Wasser
1707 H Street, N.W.
Washington, D. C. 20006

Counsel for Appellant
(Appointed by this Court)

FOR THE DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, APPELLEE

HARRY T. GASTINS, APPELLANT

Appeal from the United States District Court
for the District of Columbia

RECORDED & INDEXED

JOHN A.
DONALD
JAMES A.

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ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Was the motion for a continuance properly denied where it was based on the possibility of investigative leads developing from a person defense counsel had learned about shortly before trial and had not yet interviewed?

II. Was the motion made at the close of the Government's case for judgment of acquittal on assault with the intent to kill while armed and assault with a dangerous weapon, both against Willie Diggs, properly denied where the evidence sufficiently showed, against appellant's contrary claim, that there was sufficient evidence of the requisite intent and appellant's possession of a pistol?

III. Was the evidence sufficient to support the guilty verdicts?

IV. Was the motion for a new trial based on newly discovered evidence properly denied, where the purported evidence was merely cumulative and not likely to have produced an acquittal in any event?

* This case has not previously been before this Court.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,363

UNITED STATES OF AMERICA, APPELLEE

v.

HARRY R. GASKINS, APPELLANT

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Charged in a seven count indictment for assault with the intent to kill while armed (22 D.C. Code § 3202) (counts 1 and 4—Willie Diggs and Richard Haynes, victims), assault with the intent to kill (22 D.C. Code § 501) (counts 2 and 5—same victims), assault with a dangerous weapon (22 D.C. Code § 502) (counts 3 and 6—same victims), and carrying a dangerous weapon, *i.e.*, pistol (22 D.C. Code § 3204) (count 7), appellant was tried by jury February 27 and March 2-3, 1970 before Judge Oliver Gasch and found guilty on all counts, ex-

cept those relating to assault with the intent to kill.¹ Appellant was later sentenced to concurrent prison terms of 4 to 15 years for assault with the intent to kill while armed (counts 1 and 4), 3 to 10 years for assault with a dangerous weapon (counts 3 and 6), and the latter term also for carrying a dangerous weapon (count 7).

Government's Evidence

The case involved an argument in a local club apparently over asking a young lady to dance which carried over into the street with one victim, Willie Diggs, being shot at by appellant and the other victim, Richard Haynes, being shot in the stomach by appellant, who though not known to the victims and other witnesses, was identified easily by a cast on his hand. (It was stipulated that appellant received treatment for a fractured right hand and was released from a hospital on September 18, 1969 after a cast had been applied (Tr. 202)).

Complainant Willie Diggs

On Saturday night, September 20, 1969 complainant Willie Diggs went to the Pantheon Club at 6th and G Streets, N.W. with four friends, Julian Page, Richard Haynes, and Haynes' father and uncle (Tr. 69). Later as Mr. Diggs was asking a dance from a young lady whom he had danced with previously in the evening, a man with a cast on his hand, later identified as appellant, suddenly approached and said, "The young lady don't want to dance." Diggs said "okay", and appellant took the young lady out of the club, but returned about five minutes later and confronted Diggs (Tr. 71-72, 90).

Appellant with one hand in his pocket threatened to kill Diggs, and said that he was going to "blow [him] away" but people in the club pleaded against violence, and appellant left the club again (Tr. 73). Diggs at-

¹ It appears the jury was not allowed to return a verdict on these counts if guilt was found on the counts of assault with the intent to kill while armed.

tempted to call the police, but was encouraged to "just leave" (Tr. 73-74, 83-84, 103-104). He did so by going to the car parked near the club in which he and the others arrived (Tr. 74, 84, 86, 96). When all of them were in the car, two men (one with a hand cast) approached and Diggs was ordered out. With his reluctance, everyone was ordered out of the car and Diggs, complying, suddenly took flight along the street (Tr. 74-75, 87, 94). While being pursued some two blocks, Diggs heard a shot being fired at him but nevertheless made good his flight (Tr. 75). He ran into a park policeman, and as they returned to the parked car, Diggs heard another gun shot. On the scene he found Richard Haynes lying on the ground with an apparent gunshot wound (Tr. 75, 99-100).

Julian Page

Julian Page, a member of Diggs' party of five had observed Diggs "face to face" arguing with a man with a cast on his right hand and his left in his coat pocket at some time inside the club (Tr. 107-109). After the argument Diggs, afraid to leave the club, wanted to call the police. Eventually Diggs left the club with him and they got into a nearby car where Haynes and another were already seated (Tr. 110). Soon the man with the cast on his hand approached and ordered Diggs out of the car. With hand in pocket, he ordered everyone out of the car when Diggs did not comply. When the front door of the car opened, Diggs, who had been sitting on the back seat, jumped out and ran, with the man with the hand cast and another man in pursuit. Witness Page heard a shot fired during the chase (Tr. 111-113). In a few minutes, the two men returned and Richard Haynes, after alighting from the car and walking toward the men inquiringly, was shot as he faced them some three feet away (Tr. 113-115, 125). The two men ran and shortly thereafter a park policeman came on the scene with Diggs (Tr. 115, 125).

Complainant Richard J. Haynes

Having gone into the club with his friends, complainant Haynes in a very short time came out without incident with another, and because he was tired, stretched out in the car (Tr. 175-176, 188). Later Diggs and Page joined them, and while apparently about to start the car, he observed someone with a cast on his hand profanely ordering someone else out of the car. Diggs got out of the car, started running, and was chased by this person around a corner when a shot was heard (Tr. 177-179, 189). A few minutes later, apparently after the return of the man with the cast (Diggs' pursuer), complainant Haynes got out of his car and walked toward this person, then on the sidewalk with others that had gathered, and asked "what was going on". When about two feet away he was shot in the stomach by him (Tr. 180, 193-195). He spent 13 days in the hospital (Tr. 182).

Preston Rivers, Jr.

Mr. Rivers frequently went to the Pantheon Club and had on the instant occasion gone there alone. He did not know any of the parties or persons involved in the instant incident (Tr. 127-128). While at the bar of the club, he became aware of an argument in which a man with a cast on his hand and a hand in his pocket threatened to kill the other person (Tr. 128-129, 130, 134). Thereafter, he heard the man with the cast say, "You've got to come outside" before this same person left the club (Tr. 130). The other person, Diggs, came over to him (Rivers) and told him of the threat and asked someone to call the police. The club owner however refused to do it, indicating that the club was closing and that he would have to leave (Tr. 131). Diggs did walk out of the club, and while Mr. Rivers was still inside he heard a shot. Some minutes later after he had been told to leave the club, he noticed that someone, not the threatened man Diggs, was lying on the ground, apparently shot (Tr. 131).

Defense Evidence***Appellant***

Appellant testified that he had been with a young lady in the club, and after leaving for air, he came back into the club to observe that Diggs was asking her for a dance. He walked away and shortly returned to find Diggs still asking the young lady for a dance, despite her refusals (Tr. 212). He then approached and told Diggs "she didn't want to dance". Indicating that he did not care what she wanted to do, Diggs and two others walked toward appellant in the center of the floor where they cursed each other before appellant took the young lady outside for a cab (Tr. 213, 237, 228). When he returned to the club he was told not to cause trouble so he challenged Diggs, who seemed to mock the cast on his hand, to come outside (Tr. 213, 228, 229, 247). He did not at any time threaten to kill Diggs, nor did he have his hand in his pocket as though he had a gun.

Diggs and others came out of the club and got into a car (Tr. 214-215). Appellant saw someone talking to the occupants of the car and then saw Haynes and Diggs alight from it. He did not himself go to the car or order anyone out, but when Diggs alighted he (appellant) did, pick up a brick and pursue Diggs who had started running down the street (Tr. 215-216, 233-234). Unable to catch Diggs, appellant threw the brick away and returned to the area of the parked car, where complainant Richard Haynes approached him and asked him what had happened (Tr. 217, 218, 235, 238). While appellant was responding to Haynes, someone from a crowd of 15 or 20 people that had gathered asked Haynes "what he had to do with it". Haynes then began arguing with this individual, and upon turning away from appellant to walk a few steps toward him, Haynes was shot (Tr. 218, 218-219, 236-239). Appellant denied having any firearms that evening (Tr. 220).

Walter Anderson

Mr. Anderson, who lived across the street from the Pantheon Club, testified that some time before he went to the club, he was engaged in a gambling game with someone known only as "Ray", who before the game had procured a gun from the glove compartment of his (Ray's) car parked across the street from the club (Tr. 252-254, 269). "Ray", not appellant, witness Anderson claimed, shot complainant Haynes after the following events. While in the club Anderson saw appellant, a friend of his, arguing with someone (a "tall fellow") about a young lady who apparently was about to leave the club. This person had told her she "was not going any place". Appellant took the young lady out of the club, without making any threats to the other man (Tr. 249-250, 260-261, 269).

After the club closed and everyone went outside, Anderson saw some men get into a car and start the motor when someone named "Tate" ordered one of the persons (the tall fellow) out of the car. The person complied, but immediately started running along the street, and appellant ran after him for a short distance with a brick, which he never threw (Tr. 250-251, 262-264). When appellant returned someone (complainant Haynes) standing beside a car with two other persons asked him "what was going on" and upon appellant telling him, someone from the crowd shouted "[w]hat the . . . you [Haynes] got to do with it?" As Haynes walked a couple steps toward this person, identified as "Ray", and started cursing him, "Ray" shot him when he was about four feet away (Tr. 251, 254, 257-259). Witness Anderson stood about three feet from appellant during these events and observed that appellant did not fire any shot (Tr. 252), nor did "Ray" at any time pass appellant a gun (Tr. 252, 264). "Ray" later drove away from the scene in his car (Tr. 268).

ARGUMENT

I. There was no abuse of discretion by the trial court's denial of appellant's motion for a continuance made at the commencement of trial.

(Tr. 3-6)

When the instant case was called for trial, appellant's counsel requested a continuance because he had just learned that the father of complainant Haynes was on the scene of the shooting. The prosecutor, opposing the continuance, because of the Government's readiness, indicated that the representation was true and further that complainant Haynes' father was available for defense interview² (Tr. 4-5). Appellant's counsel however felt this was insufficient since the interview with the father "could develop more information which would permit [him] to make a *further* investigation" and that a continuance of a few weeks would provide an opportunity "to work on it". (Tr. 3-6) (emphasis added).

Appellant's claim now that the trial court improperly denied his motion for continuance (Appellant's brief, pp. 9-10) is ill-founded. Appellant was merely desirous of additional time "to develop a line of defense from that investigation" (Appellant's brief, p. 9), and the trial court was not obliged to delay this trial on such speculative grounds. As it developed the Government presented only about half of its case during the first day

² It is not entirely clear to us that the prosecutor was actually indicating that Haynes' father would relate events "diametrically opposed" to his son's version, as appellant claims. (Appellant's brief, p. 9). While his remarks (Tr. 5) may be subject to this interpretation, they are far from being as conclusive as appellant has cast them. We think the prosecutor was merely restating the basis for appellant's claim ("This is the statement by the witness' father to the effect that Gaskin[s] is not the man that shot him") and in his next comment undertook to explain what he had related to defense counsel. In any event, if appellant's counsel, whose capable defense and diligent investigation of this case are apparent on this record, learned that Haynes' father, who was available, would indeed offer some version contrary to his son's, then no reason whatever appears for his not being called as a defense witness.

of trial, Friday, February 27, 1969, and if, in fact, the interview with the father, which we assume occurred, developed some investigative leads, the weekend, as well as the remaining time of trial (March 2-3), presented sufficient opportunity to pursue them. Since no concrete matters were thereafter brought to the attention of the court, it is fair to assume that none developed.

II. Denial of appellant's motion for judgment of acquittal on counts (1 and 3) charging assault with the intent to kill while armed and assault with a dangerous weapon, was proper.

(Tr. 71, 73, 75, 80, 90, 130, 205-208)

At the close of the Government's case, appellant's counsel moved for dismissal of two counts of the indictment (which the trial court properly treated as a motion for judgment of acquittal) on the grounds that there was insufficient proof that appellant assaulted Willie Diggs with the intent to kill under count one, and with a gun under count three (Tr. 205-208). Appellant claims that denial of the motion regarding those counts was erroneous. Appellant's brief, pp. 10-14). We disagree.

Willie Diggs, himself, categorically testified that in the argument with appellant in the Pantheon Club appellant threatened to kill him and, among other things, "he [appellant] said he was going to blow me away" while arguing with a hand in his pocket (Tr. 71, 73, 80, 90). A disinterested witness, unacquainted with any of the parties, heard this threat while he was sitting at the bar of the club (Tr. 130). Moreover, after Diggs was ordered out of the car and chased along the street by appellant, Diggs testified that he heard a shot being fired at him (Tr. 75). Witness Page also testified to hearing a shot being fired during this chase (Tr. 112). This evidence alone, viewed most favorably to the Government, was

sufficient to establish the requisite intent to kill and possession of a gun, and therefore compelled jury consideration. See *Curley v. United States*, 81 U.S. App. D.C. 389, 60 F.2d 229, cert. denied, 331 U.S. 837 (1947); *Crawford v. United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967).

III. The evidence was sufficient to support the guilty verdicts rendered on the five counts of the indictment.

Appellant appears to claim that the convictions for assault with the intent to kill while armed against Willie Diggs and Richard Haynes (counts 1 and 4), the assault with a dangerous weapon against the same victims (counts 3 and 6), and carrying a dangerous weapon (count 7), are unsustainable because there was insufficient evidence showing that appellant actually possessed a gun. (Appellant's brief, pp. 14-15). On the contrary, the testimony of Willie Diggs and Julian Page who heard a shot while appellant chased Diggs, and that of Richard Haynes who, a few moments later, actually saw the gun in appellant's hand when he was shot in the stomach while only a few feet away, sufficiently indicates that appellant did possess the weapon. (See Counterstatement herein).

IV. The motion for a new trial was properly denied.

Based on the post-trial affidavit of one Ollie Wainwright, who asserted principally that he observed an argument in the Pantheon Club, that he later saw one "Ray" fire a gun at someone (complainant Diggs) running along the street while appellant chased this person with a brick, and that he thereafter urged appellant to leave the scene, before departing himself, to avoid further injury to his (appellant's) hand which was in the cast,³ appellant claims that his motion for a new trial was improperly denied. (Appellant's brief, pp. 15-16).

³ See affidavit, Exhibit A, accompanying motion for a new trial based on newly discovered evidence, filed May 6, 1970, Cr. No. 1919-69.

Suffice it to say, the proffered evidence would have been merely cumulative to testimony already presented to the jury, particularly that of defense witness Walter Anderson, and was not of such a character as to probably produce an acquittal in any event. See Counterstatement, *supra*. Clearly, there was no abuse of the trial court's discretion in denying the motion. *Thompson v. United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
DONALD T. BUCKLIN,
JULIUS A. JOHNSON,
Assistant United States Attorneys.

